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IN THE

Supreme Court of the United States

October Term, 1943.

No. 1061

PRESQUE-ISLE TRANSPORTATION CO.,
a corporation,

Petitioner,

vs.

CARL KOEHLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF OF PETITIONER.

EDWARD W. HAMILTON,
Counsel for Petitioner.

SANDERS, HAMILTON, DOBMEIER, CONNELLY & McMAHON,
508 Walbridge Building, Buffalo, New York,
Attorneys for Petitioner.



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No.

**PRESQUE-ISLE TRANSPORTATION CO.,
a corporation,**

Petitioner,
vs.

CARL KOEHLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Statement.

THE PETITION OF PRESQUE-ISLE TRANSPORTATION CO., A CORPORATION, RESPECTFULLY SHOWS TO THIS HONORABLE COURT:

That action was brought in the United States District Court for the Western District of New York by Carl Koehler v. Presque-Isle Transportation Co.; that the action was originally in the form of a suit in Admiralty, and that Libel

was filed on or about the 26th day of November, 1940; that by agreement of the parties the suit in Admiralty was converted into an action at law under the so-called Jones Act, Title 46, Sec. 88 U. S. C., and an Amended Complaint was filed on the 2nd day of January, 1942; that the Amended Complaint alleged that the defendant was a corporation organized under the laws of the State of Delaware, and engaged in operating a fleet of steam vessels on the Great Lakes, and particularly the vessel registered and known as the "Angeline"; that the plaintiff was in the employ of the defendant company as a wheelsman; that on the 21st day of November, 1940, while the vessel "Angeline" was docked in the Port of Buffalo, New York, for the purpose of removing its cargo, the plaintiff was attacked by a member of the crew, known as "Jerry," also a wheelsman in the employ of the defendant; that he thereupon, under instructions of a third mate of the vessel, left the ship and when he returned later the same member of the crew violently assaulted the plaintiff and caused injuries for which he sought a judgment for damages against the defendant corporation; that the injuries to the plaintiff were caused through the carelessness and negligence of the defendant in that it negligently employed and retained Fred Johnson, a third mate, in its service, and that said Johnson was careless and negligent in the performance of his duties in that he negligently permitted an individual known as "Jerry" to remain in a position to be able to inflict injuries on the plaintiff, with full knowledge of the fact that the said "Jerry" had threatened to inflict personal injuries on the plaintiff, and that the defendant company was careless and negligent in employing and retaining in its employ the wheelsman known as "Jerry" when it had knowledge of his habitual belligerent nature, and in failing to give plaintiff any notice or warning whatsoever.

The defendant filed an Answer January 12, 1942, admitting that it was engaged in commerce on the Great Lakes, and was operating the Steamer "Angeline." It raised an issue, by denial of the other material allegations in the Complaint, and alleged that if the plaintiff sustained any injury while in its employ, it was through no fault of the defendant, but solely through the negligence of the plaintiff, and his own wilful misconduct.

The case went to trial on the Complaint and Answer, on the 16th day of February, 1943. At the close of the plaintiff's case the defendant moved to dismiss the Complaint on the ground that the plaintiff had failed to prove a cause of action, and specifically on the grounds that there was no evidence either that the acts of the employee Todd were within the scope of his authority or done in furtherance of the master's interest.

At the close of all the testimony the defendant moved for a direction of a verdict of no cause of action in favor of the defendant on the ground that the plaintiff failed to show the defendant knew or had notice that Todd was of a vicious or belligerent character, that the altercation between the plaintiff and Todd was a purely personal affair, and on the ground that Todd was not acting within the scope of his authority or in the interest of the master. Upon this motion the Court reserved decision and submitted three specific questions to the jury, viz.:

1.—Was Todd of a vicious and belligerent nature, and likely to inflict bodily harm upon other members of the crew?

2.—If so, was that fact known to the officers of the ship, or should it have been known to them in the exercise of ordinary diligence?

3.—Was plaintiff's physical condition, as revealed by the hospital records at Cleveland, the natural result of the injuries he received in the fight on the ship?

The Jury answered each specific question in the affirmative, and rendered a general verdict in favor of the plaintiff for \$3000. The Court thereupon entertained the defendant's motion for a directed verdict, the decision of which had been reserved, and thereafter, on April 17, 1943, handed down a decision granting the motion. After a re-argument, and on July 30, 1943, the Court rendered a decision allowing the verdict to stand.

An Order was entered on this decision on September 14, 1943, and, on the same day, judgment for the plaintiff in the sum of \$3163 was entered. From the Order and Judgment so entered, the defendant appealed to the United States Circuit Court of Appeals for the Second Circuit. The case was argued in the Circuit Court of Appeals on March 9, 1944. Decision was handed down affirming the Judgment of the District Court, on the 24th day of March, 1944. Judgment was entered in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit on the 19th day of April, 1944, affirming the Order and Judgment so appealed from.

A certified copy of the entire record of said case in the District Court and in the Circuit Court of Appeals is hereby furnished, marked "Exhibit A," and made a part of this application.

Reasons for Granting Writ.

Petitioner assigns as error:

- (a) The refusal of the District Court to grant the motion of the defendant for a directed verdict in favor of the defendant on the grounds:

- 1.—That there was no showing of actionable negligence on the part of the ship owner.
- 2.—That there was no sufficient evidence that defendant's employee Todd was of a vicious or belligerent disposition.
- 3.—That there was no evidence that the defendant knew or had notice that its employee Todd was of a vicious or belligerent character.
- 4.—That the altercation between the plaintiff and Todd was a purely personal affair.
- 5.—That Todd was not acting within the scope of his authority or in the interest of the master.

(b) That the United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment and Order of the District Court, and in not reversing the same.

Petitioner is advised and believes that the Judgment of the Court of Appeals is erroneous and contrary to decisions of this Honorable Court, in like and similar cases, and particularly the case of *Davis v. Greene*, 260 U. S., 349; that the District Court and the Court of Appeals have decided under the facts in this case that the ship owner, without regard to its negligence, is liable to an employee on board ship for injuries inflicted upon him by a fellow employee, and that in so doing they have so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Title 28, Sec. 347, U. S. C.

Prayer.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in said case, entitled "Carl Kochler, Plaintiff-Appellee, vs. Presque-Isle Transportation Co., Defendant-Appellant", to the end that the said case may be reviewed and determined by this Court, as provided by Sec. 347, Title 28, U. S. C., and that the said Judgment of said Court of Appeals in said case may be reversed by this Honorable Court.

PRESQUE-ISLE TRANSPORTATION CO.,
Petitioner.

By EDWARD W. HAMILTON,
Counsel for Petitioner.

SANDERS, HAMILTON, DOBMEIER, CONNELLY & McMAHON,
Attorneys for Petitioner.

United States of America,
State of New York,
County of Erie. } ss.:

Personally appeared before me the undersigned notary public, ~~Edward W. Hamilton, who
Harry D. Sanders and John F. Connolly, and each~~ being duly sworn on oath deposes and says: That he is the counsel for the within named petitioner Presque-Isle Transportation Co., a corporation; that he has personal knowledge of the matters mentioned in the foregoing Petition; that the allegations of the Petition are true to the best of his knowledge and belief, and that he has signed said Petition on behalf of the petitioner.

EDWARD W. HAMILTON.

Sworn to before me at Buffalo, New York,
this 23rd day of May, 1944.

Marie E. Harder,
Notary Public, Erie County, New York.
(Notarial Seal)